



**Billing Code: 5001-06**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**[Docket ID DoD-2015-OS-0124]**

**U.S. Court of Appeals for the Armed Forces Proposed Rules Changes**

**ACTION:** Notice of Proposed Changes to the Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces.

**SUMMARY:** This notice announces the following proposed changes to Rules 5, 21(b)(5)(F), and 26 of the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces.

**DATES:** Comments on the proposed changes must be received by [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number and title by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301-9010.

*Instructions:* All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** William A. DeCicco, Clerk of the Court, telephone (202) 761-1448.

Dated: November 5, 2015.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

**Rules 5 and 21(b)(5)(F):**

*Rule 5 – Scope of Review - currently reads:*

The Court acts only with respect to the findings and sentence as approved by reviewing authorities, and as affirmed or set aside as incorrect in law by a Court of Criminal Appeals, except insofar as it may take action on a certificate for review or a petition for review of a decision by a Court of Criminal Appeals on appeal by the United States under Article 62, UCMJ, 10 USC § 862, or to grant extraordinary relief in aid of its jurisdiction, including the exercise of its supervisory powers over the administration of the UCMJ. The Court may specify or act on any issue concerning a matter of law which materially affects the rights of the parties.

*The proposed change to Rule 5 would read:*

The Court acts only with respect to the findings and sentence as approved by reviewing authorities, and as affirmed or set aside as incorrect in law by a Court of Criminal Appeals, except insofar as it may take action on a certificate for review or a petition for review of a decision by a Court of Criminal Appeals on appeal by the

United States under Article 62, UCMJ, 10 USC § 862, or to grant extraordinary relief in aid of its jurisdiction. The Court may specify or act on any issue concerning a matter of law which materially affects the rights of the parties.

*Rule 21(b)(5)(F) – Supplement to Petition for Grant of Review - currently reads:*

(b) The supplement to the petition shall be filed in accordance with the applicable time limit set forth in Rule 19(a)(5)(A) or (B), shall include an Appendix containing a copy of the decision of the Court of Criminal Appeals, unpublished opinions cited in the brief, relevant extracts of rules and regulations, and shall conform to the provisions of Rules 24(b), 35A, and 37. Unless authorized by Order of the Court or by motion of a party granted by the Court, the supplement and any answer thereto shall not exceed 25 pages, except that a supplement or answer containing no more than 9,000 words or 900 lines of text is also acceptable. Any reply to the answer shall not exceed 10 pages, except that a reply containing 4,000 words or 400 lines of text is also acceptable. The supplement shall contain:

. . . (5) A direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to the substantial rights of the appellant. Where applicable, the supplement to the petition shall also indicate whether the court below has:

. . . (F) so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a court-martial or other person acting under authority of the UCMJ, as to call for an exercise of this Court's power of supervision; or . . .

*The proposed change to Rule 21(b)(5)(F) would read:*

. . . (F) so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a court-martial or other person acting under authority of the UCMJ, as to warrant review by the Court; or . . .

Comment: Documents have recently been filed with the Court citing to the supervisory power noted in the Court's Rules 5 and 21(b)(5)(F). This is somewhat problematic because the references to supervisory power in these rules predate the Supreme Court's decision in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), which

rejected an expansive view of the Court's supervisory power over all aspects of military justice. Specifically the Court stated: "[T]he CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice or to act as a plenary administrator of final judgments it has affirmed." 526 U.S. 529, 536. Given *Goldsmith*, the broad references to supervisory power in the rules should be deleted. That is not to say that supervisory authority does not exist, only that it is not as expansive as it was pre-*Goldsmith*, and its contours will need to be resolved in future cases. However, the Court's Rules of Practice and Procedure should not be cited as a source for this authority in the absence of settled case law.

## **Rule 26:**

*Rule 26 – Amicus Curiae Briefs - currently reads:*

(a) A brief of an amicus curiae may be filed (1) by an appellate government or defense division of an armed service other than that in which the case has arisen, (2) by invitation of the Court, or (3) by motion for leave to file granted by the Court.

(b) Unless otherwise ordered by the Court, a brief of an amicus curiae in support of a party may be filed no later than 10 days after that party has filed its brief. If neither party is supported, the brief of an amicus curiae shall be filed no later than 10 days after the first brief is filed.

(c) Neither the hearing nor the disposition of a case will be delayed pending action on a motion for leave to file an amicus curiae brief or a motion of an amicus curiae to participate in a hearing, or to await the filing of a brief of an amicus curiae under this rule.

(d) Except by the Court's permission, a brief of an amicus curiae may be no more than one-half the maximum length authorized by Rule 24 for a brief for an appellant/petitioner. If the Court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) A member of the Bar of the Court who represents an amicus curiae and is authorized to file a brief under paragraph (a) of this rule may file a motion for leave to have a law student enter an appearance on behalf of the amicus curiae. To be eligible to participate under this rule, a law student must be acting under the attorney's supervision and the attorney and the law student must substantially

comply with the requirements of Rule 13A(b)(1) - (5) and (c)(1) - (11). Argument by a law student granted permission to appear on behalf of an amicus curiae may be requested by motion filed under Rule 30.

*The proposed change to Rule 26 would read:*

(a) A brief of an amicus curiae may be filed (1) by an appellate government or defense division of an armed service other than that in which the case has arisen, (2) by invitation of the Court, or (3) by motion for leave to file granted by the Court.

(b) All motions and briefs filed under Rule 26(a)(3) must contain a statement of the movant's interest and why the matters asserted are relevant to the disposition of the case. Amicus curiae briefs filed pursuant to Rule 26(a)(3) that bring relevant matter to the attention of the Court not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored. The motion must also provide a statement as to whether the parties consent to the filing of the amicus curiae brief. Only an attorney admitted to practice as a member of the Bar of the Court or an attorney appearing pro hac vice may file an amicus curiae brief.

(c) An amicus curiae brief submitted before the Court's consideration of a petition for grant of review, petition for extraordinary relief, writ-appeal petition, or petition for new trial may be filed under subparagraphs (a)(1) or (a)(2), or if the Court grants leave to file under subparagraph (a)(3) of this rule.

(d) Unless otherwise ordered by the Court, a brief of an amicus curiae in support of a party shall be filed no later than 10 days after that party has filed its brief, supplement to the petition for grant of review, petition for extraordinary relief, writ-appeal petition, or answer. If neither party is supported, the brief of an amicus curiae shall be filed no later than 10 days after the first brief, supplement to the petition for grant of review, petition for extraordinary relief, or writ-appeal petition is filed. In the case of a petition for new trial, the brief of an amicus curiae shall be filed no later than 10 days after the petitioner's brief in support of the petition has been filed with the Court. Motions for leave to file an amicus curiae brief under Rule 26(a)(3) must be filed within the time allowed for the filing of the brief and contemporaneously with the amicus curiae brief itself. Requests for extensions of time to file an amicus curiae brief will not be granted. A party may file a motion under Rule 30 for leave to reply to the brief of an amicus curiae.

(e) Neither the hearing nor the disposition of a case will be delayed pending action on a motion for leave to file an amicus curiae brief or a motion of an amicus curiae to participate in a hearing, or to await the filing of a brief of an amicus curiae under this rule.

(f) Except by the Court's permission, a brief of an amicus curiae may be no more than one-half the maximum length authorized by Rule 24 for a brief for an appellant/petitioner. If the Court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(g) A member of the Bar of the Court who represents an amicus curiae and is authorized to file a brief under paragraph (a) of this rule may file a motion for leave to have a law student enter an appearance on behalf of the amicus curiae. To be eligible to participate under this rule, a law student must be acting under the attorney's supervision and the attorney and the law student must substantially comply with the requirements of Rule 13A(b)(1) – (5) and (c)(1) – (11). Argument by a law student granted permission to appear on behalf of an amicus curiae may be requested by motion filed under Rule 30.

Comment: The first part of new paragraph (b) tracks similar language in Supreme Court Rule 37. It advises that “me too” briefs are not favored, and this is generally the view of all appellate courts. The proposal goes on to require that motions for leave to file, as well as the amicus briefs themselves, contain a statement of the movant's interest and explain why the matters asserted in the brief are relevant to the disposition of the case. The proposal operates differently from the practice in the Article III courts of appeal in that even with the consent of the parties, an amicus filer must still ask for leave of the Court to file an amicus curiae brief. In this way, the Court retains the authority to decide all requests to file amicus briefs based on its own determination that the brief will be helpful. It is believed that party consent may not be an adequate filter that ensures that amicus briefs are helpful to the Court. While party consent is not a guarantee that the brief will be accepted, lack of consent is not a guarantee that it will be rejected. Rather, the Court oversees all filings to be sure that amicus participation is warranted. Paragraph (b) also includes a requirement that only members of the Court's Bar or attorneys appearing pro hac vice may file motions for leave to file amicus curiae briefs.

Paragraph (c) proposes a new rule to clarify that motions to file amicus curiae briefs can be filed in support of petitions for grant of review, petitions for

extraordinary relief, writ-appeal petitions, petitions for new trial, and answers to such pleadings.

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